Supreme Court, U.S.
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No. 87-1837

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

PARKVIEW ASSOCIATES,

Appellant,

v.

CITY OF NEW YORK, COMMISSIONER OF BUILDINGS OF THE CITY OF NEW YORK, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK, BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK and CIVITAS CITIZENS, INC.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

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Preliminary Statement

"Due process asks whether government has treated someone fairly . . . ." Brennan, *Reason, Passion and "The Progress of the Law"*, 42 Rec. A.B. City N.Y. 948, 966 (1987). The City cannot pass that test.[1]

Appellees devote most of their energy to establishing a proposition that is neither disputed nor dispositive, *i.e.*, that it has been determined by New York's highest court that, as a matter of state law, the PI District's boundary at 96th Street is and always was 150 feet from Park Avenue.

That proposition begs the question, however, of whether it is consistent with due process for the City of New York, having systematically and authoritatively represented that the boundary was only 100 feet from Park Avenue, to apply to appellant the provisions of its Administrative Code and Zoning Resolution so as to revoke a permit on the fiction that it was without any validity and conferred no rights. *See, e.g., O'Brien v. Skin-*

1 The abbreviations and references herein are those used in appellant's jurisdictional statement, which is cited herein as "J.S."

ner, 414 U.S. 524, 531 (1974); *Kingsley Pictures Corp. v. New York State Board of Regents*, 360 U.S. 684, 688-689 (1959).

Unlike the zoning cases relied upon by the City, this one is not routine. Appellant's "planning dispute" is not "run of the mill" or "conventional" (*cf. Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 [1st Cir.], *cert. denied*, 459 U.S. 989 [1982]); appellant does not challenge "the normal operation of a zoning system" (*cf. Hynes v. Pasco County*, 801 F.2d 1269, 1270 [11th Cir. 1986]); it is not asking this Court to "sit as a zoning board of appeals" (*Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 [1974] [Marshall, J., dissenting]). The Court of Appeals may have determined the location of the PI District's boundary, but not before appellant had put up 31 stories, at a cost of $7.2 million, in reliance upon a permit and the City's official zoning map. "The past cannot always be erased by a new judicial declaration." *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374 (1940).

Land use is principally a matter for state and local regulation, so that, "perhaps particularly with respect to matters involving the regulation of land," this Court owes the States' judgments "great deference." *Texaco, Inc. v. Short*, 454 U.S. 516, 554 (1982) (Brennan, J., dissenting). "Nevertheless, the Due Process Clause of the Fourteenth Amendment was designed to guard owners of property from the wholly arbitrary actions of state governments." *Id.* It has been observed, moreover, that "[t]he 1980s have been a decade of enormous innovation at the state level," and that "at both the state and local levels, we are in the midst of a new progressive era." Osborne, *Laboratories of Democracy* 1-3 (1988). It therefore is imperative that this Court continue to refine the principles of due process that circumscribe the efforts of the States and their instrumentalities to regulate private property and commercial activity.

As shown below, (1) this Court has jurisdiction of this case, (2) the questions presented are substantial, and (3) they are ripe notwithstanding the variance application.

I. Appellant Has Properly Invoked This Court's Appellate Jurisdiction Under 28 U.S.C. § 1257(2)

When appellant took this appeal, 28 U.S.C. § 1257(2) gave this Court jurisdiction, because there "is drawn in question the

validity of a statute . . . on the ground of its being repugnant to the Constitution . . . , and the decision is in favor of its validity." Appellees argue that appellant's due process claims are not subject to appellate review in this Court because they "challenge . . . the effect of the exercise of authority under local law without otherwise drawing into question the constitutional validity of any statute" (City Mtn. p. 19; *see also* Civitas Mtn. pp. 11-12). Appellees are wrong.

The reference in § 1257(2) to a "statute" includes local ordinances. *See, e.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205, 207 n.3 (1975); *King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100, 114 (1928). Furthermore, the claim of invalidity may be a claim that a statute or ordinance that is valid on its face has been construed and applied to particular facts in a manner that is unconstitutional. *See, e.g., International Longshoremen's Ass'n v. Davis*, 106 S.Ct. 1904, 1910 n.8 (1986); *Cohen v. California*, 403 U.S. 15, 17-18 (1971).

The City consistently has justified its revocation of appellant's permit on the theory that, under Administrative Code § 27-197 and the Zoning Resolution, it had no discretion to do otherwise; appellant consistently has attacked that position as repugnant to due process. The Court of Appeals expressly held that, in view of § 27-197 and the Zoning Resolution, "there was no discretion reposed in" the City's agencies "to do otherwise" than revoke appellant's permit "on the record before them" (J.S. App. p. 7a); it nevertheless refused to adjudicate, and thus rejected (*see* J.S. pp. 28-29), what it characterized as a "claim that the City's action constitutes a taking without due process" (J.S. App. p. 8a). In reaching these conclusions, the court necessarily rejected the contention that these statutes, as construed and applied by the City, were unconstitutional.

The record further demonstrates such rejection. Thus, in its main brief to the Court of Appeals, appellant stated that one of the questions presented was whether "the City's retroactive *application* of its reinterpretation *of its zoning laws* constitute[d] a denial of due process in contravention of the Fourteenth Amendment to the Constitution of the United States" (p. 6) (emphasis added). In *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928), this Court stated:

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution . . . . No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time.

See also, e.g., Street v. New York, 394 U.S. 576, 584 (1969); *Braniff Airways, Inc. v. Nebraska State Board of Equalization*, 347 U.S. 590, 599 (1954). Appellant put the court below on fair notice of its claim that the City was applying a statute in a manner that was repugnant to the Fourteenth Amendment.

II. Appellant Has Asserted Substantial Constitutional Claims

Appellant's constitutional claims are substantial (*see* J.S. pp. 16-29). As shown below, (a) appellant has been deprived of property, and (b) appellant was entitled to rely on the City's zoning map, which authoritatively depicted the PI District's boundary to be 100 feet from Park Avenue.

A. Appellant Has Been Deprived of "Property"

For purposes of constitutional law, the term "property" refers broadly to "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it,"-so that the constitutional protections afforded to property owners are "addressed to every sort of interest the citizen may possess." *United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945); *see also Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 142 (1978) (Rehnquist, J., dissenting).

Appellant's property rights included the right to develop its parcel to the maximum extent authorized by law; appellant therefore had a reasonable expectation that it would be able to derive some profit. The manner in which the City has applied its statutes, however, has deprived appellant of any opportunity profitably to construct a building that conforms with the City's zoning laws (*see* J.S. p. 8). Furthermore, although appellant had topped off its building at 31 stories and spent $7.2 million in construction costs when it first learned that its permit might be infirm, all construction has been halted since 1986. Appel-

lant has been unable to complete the building and sell the units while the top twelve stories remain in dispute. The Property has generated no income for two years. In the meantime, the City has continued to assess real estate taxes, other carrying charges also continue, and construction costs escalate. In addition, if the building is completed pursuant to a variance rather than on an as-of-right basis, appellant will lose substantial tax abatements. Therefore, regardless of whether the permit itself constituted property, appellant plainly has suffered a substantial deprivation of property.

As to the permit itself, moreover, it also constitutes property, "[f]or a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property . . . never existed at all." *Hughes v. Washington*, 389 U.S. 290, 296-297 (1967) (Stewart, J., concurring). On the facts of this case, such a fiction is not consistent with due process (*see* J.S. pp. 23-27).[2]

B. Appellant Was Entitled to Rely on the Zoning Map, Which Depicted the Boundary at 100 Feet

Although the Court of Appeals determined that the PI District extends 150 feet from Park Avenue, no such determination had been made when appellant obtained its permit and put up its 31 stories, and there was no reason for appellant to believe that such a determination could be made. Indeed, so far as appellant or the public knew, there was no issue to be determined. Therefore, it is inconsistent with due process to apply the determination retroactively (*see* J.S. pp. 23-27).

Appellant's permit was issued after meticulous examination of its building plans and in conformity with the City's official

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2 The City refers to a brief resumption of construction after the revocation of appellant's permit in July of 1986 (City Mtn. pp. 11-12). While appellant's administrative appeal was pending before the BSA, "all proceedings in furtherance of the action appealed from" were stayed "unless" the Commissioner of Buildings certified that "a stay would in his opinion cause imminent peril to life or property . . . ." City Charter § 669(c). The Commissioner never made any such certification, so appellant lawfully, and briefly, resumed construction. This temporary resumption is irrelevant, because appellant never has sought to predicate any legal or equitable rights on the work performed during the resumption.

zoning map, a document prepared and published by the City and intended to be authoritative (*see* J.S. pp. 5-6, 18-19). This case is not one in which a citizen relied upon an oral interpretation by a governmental official or agent. *Cf. Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 56 (1984); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 382 (1947).

At the relevant times, the zoning map depicted the PI District's boundary as 100 feet from Park Avenue at 96th Street. It showed no numerical dimension specifying a different distance, and the interpretation of the map therefore appeared to be governed by unambiguous statutory rules.[3]

The depiction on the map was no mere printer's error. Contrary to a central contention of appellees (City Mtn. pp. 7-8, 30-32; Civitas Mtn. pp. 13-14), the legislation approved by the Board of Estimate on March 3, 1983, was *not* clear and free from ambiguity. The legislation's implementation and incorporation in the City's official zoning maps therefore required

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3 A copy of zoning map 6b as it existed at the relevant times is Appendix 1 hereto. The relevant statute, *i.e.*, the Zoning Resolution, expressly provides that "[t]he location and boundaries of the districts established by this resolution are shown upon the zoning *maps*" (§ 11-14), and that "[t]he district boundaries on the *zoning maps* shall be interpreted in accordance with the provisions set forth in . . . Section 76-13" (§ 76-11) (emphasis in original). Section 76-13 mandates that "[t]he precise location of a boundary line is to be interpreted in accordance with the provisions set forth in this Section," and one of that section's subsections, § 76-131, provides, as applied to this case, that "where a boundary line extends parallel to [Park Avenue] and no dimensions are shown, such boundary line shall be considered to be located . . . (c) . . . 100 feet from [Park Avenue]." The City's contention that § 76-131(c) does not apply here because the Board of Estimate's resolution supposedly "clearly indicates dimensions" (Mtn. pp. 37-38) is preposterous. The term "dimensions" as used in the statute refers to the numerical dimensions on the zoning maps, not to anything in Board of Estimate resolutions, which are not part of the Zoning Resolution. Even Civitas concedes that § 76-131(c), by its terms, applied to map 6b (*see* Mtn. p. 6 n.4). Similarly, counsel to the Department of Buildings conceded before the BSA that § 76-131(c) applied.

interpretation.[4] For the same reason, the City's actions in changing that depiction were not merely ministerial, and appellant was entitled to notice of that change (*see* J.S. pp. 20-22).[5]

Nor is there merit to appellees' contention that the decision below is just another application of an established state law rule that a building permit issued in error confers no rights and may be revoked (*see* City Mtn. pp. 28-29, 41-44; Civitas Mtn. pp. 18-22). This case dramatically extends that rule to unprecedented facts. Prior cases involved misinterpretations of the zoning ordinance by a building inspector or inadequate or deceptive building plans that misled the inspector. Appellant, by contrast, submitted accurate plans to the Department of Buildings, which construed the Zoning Resolution in a reasonable manner on the basis of the materials provided to it by the Department of City Planning, *i.e.*, the sister agency responsible for drafting and preparing zoning legislation and revising and publishing zoning maps once such legislation has been enacted.

Appellees' other contentions also are without merit. For example, Civitas argues, and the City implies, that appellant should have been alerted to the possibility that map 6b was erroneous by shading that suggested that the PI District might extend more than 100 feet from Park Avenue at 96th Street (Civitas Mtn. pp. 6, 26; City Mtn. p. 53). But appellees' conten-

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4 The legislation incorporated a diagram (Appendix 2 hereto) that plainly depicted the PI District's boundary at 100 feet from Park Avenue at 96th Street. The diagram, which was dated October 25, 1982, had been prepared by the Department of City Planning, certified by the City Planning Commission and reviewed at numerous public hearings in the course of the City's ULURP process. A similar diagram (Appendix 3 hereto) dated December 5, 1983, which had been prepared, certified, reviewed and approved as part of subsequent legislation adopted by the Board of Estimate, contained the same depiction. By contrast, a draft thereof depicted the boundary at *150* feet from Park Avenue at 96th Street, but that draft never was certified by the City Planning Commission and never was approved by the Board of Estimate. Clearly, the boundary's precise location at 96th Street was the subject of review in 1983 within the Department of City Planning, and its depiction on map 6b reflected an act of interpretation by that agency.

5 Appellees' analogy between the zoning map and a codification of statutes (City Mtn. pp. 33-34, Civitas Mtn. pp. 15-16) is misplaced. None of the cases cited by appellees involved documents like the City's zoning maps, which are prepared and published by the same agency that drafts the underlying legislation.

tion is belied by their own conduct: the City and Civitas themselves relied, without raising *any* question or conducting *any* further inquiry, on the same map.[6]

This reliance by *all* parties on the zoning map was consistent with the Zoning Resolution (*see* p. 6 and n.3, *supra*). Furthermore, the lower courts did not find (and the Court of Appeals had no jurisdiction to find) that appellant's reliance on map 6b was unreasonable (*see* J.S. p. 16 n. 3). In view of the unambiguous statutory rules for interpreting that map, the record would not support any such finding.[7]

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6 The City insinuates that it merely relied upon a certification by appellant's architects (Mtn. pp. 9-10). The record, however, contains uncontradicted eyewitness affidavit testimony that the examiner at the Department of Buildings actually reviewed map 6b to ascertain the relevant zoning (*see also* J.S. pp. 9-10 and n.2). Indeed, the examiner was obligated to do so: under the applicable statute, Administrative Code § 27-191, "[a]ll applications for permits and any accompanying plans . . . shall be examined . . . for compliance with the provisions of this code and other applicable laws"; the regulations of the Department of Buildings authorize examiners to rely on architects' certifications that building plans comply with certain enumerated statutes, *not* including the Zoning Resolution; it is the examiner's responsibility, under the express terms of those regulations, to conduct a *full* examination of all building plans for compliance with "[a]ll applicable provisions of the Zoning Resolution"—which is precisely what the examiner in this case did.

7 Contrary to appellees' unwarranted speculation (City Mtn. p. 53, Civitas Mtn. p. 25), the possibility that appellant's principals examined map 6b in 1982, when they acquired the Property, is irrelevant; it is undisputed that map 6b was changed materially in 1983 and 1984 and, moreover, that appellant's intentions as to how to develop the Property changed dramatically in 1984. Thereafter, appellant commissioned experienced architects, whose responsibilities included ascertaining the zoning applicable to the Property. Under New York law, the question of whether conduct amounts to negligence is a question of fact. *See, e.g., Ugarriza v. Schmieder*, 46 N.Y.2d 471, 475 (1979). New York's highest court has specifically held, moreover, that the question of whether an architect acted diligently in his dealings with the City's Department of Buildings cannot be determined without expert testimony. *530 East 89 Corp. v. Unger*, 43 N.Y.2d 776, 777-778 (1977). In the present case, appellant adduced affidavit testimony about industry custom and practice; appellees adduced none. Contrary to Civitas's misinterpretation of the record, moreover (Mtn. pp. 8, 26), appellant's architects did not examine, in November of 1985 or on any other relevant occasion, any diagram showing the PI District's boundary to be 150 feet from Park Avenue.

III. Appellant's Due Process Claims Are Ripe for Adjudication Notwithstanding the Variance Application's Pendency

The City asserts that "the pendency of the variance application makes the extent of [appellant's] harm, if any, incapable of determination at this time" (p. 21), and it argues that therefore the "due process claim is prematurely asserted" (p. 49). There is no merit to this contention.

The suggestion that a determination of the variance application is necessary to ascertain whether appellant will suffer "any" harm is offensive. Although the precise extent of appellant's injuries remains unclear, appellant plainly has suffered enormous injuries that no variance will cure (*see* pp. 4-5, *supra*). Unlike a claim that zoning laws have effectuated a taking without compensation, a claim that an owner has been deprived of property without due process does not require a final reckoning of the precise quantum of harm (*see* J.S. pp. 27-28).

Appellant brought the present litigation, moreover, to vindicate *legal* rights. It is entitled to have its claims adjudicated in a court of law; any factual issues should not be relegated to the informal procedures of the BSA, where witnesses are not sworn and there is no cross-examination.

Furthermore, adjudication of appellant's legal claims should not be avoided on the theory that resolution of the variance application is imminent. Although the BSA has scheduled a hearing on the variance application for August 9, 1988, and although appellant believes that it is entitled to a variance, none will be issued on August 9. The process will require several hearings and sessions extending over months. It is not certain, moreover, that appellant *ever* will obtain a variance; Civitas certainly will oppose the application.

If appellant obtains a variance, Civitas in all likelihood will seek review, pursuant to City Charter § 668(c), by the Board of Estimate, a body of elected officials. While the Board of Estimate's power to review variances is circumscribed by statute, it often has exceeded those powers and improperly annulled law-

ful variances.[8] With an eye obviously cast on the publicity that this case has generated, one member of the Board of Estimate, *i.e.*, the City's Comptroller, already has stated publicly and repeatedly that appellant should *not* be granted a variance. The variance application thus is likely to lead to further litigation.[9]

Conclusion

This Court has appellate jurisdiction of this case, which raises substantial constitutional questions.

July 21, 1988

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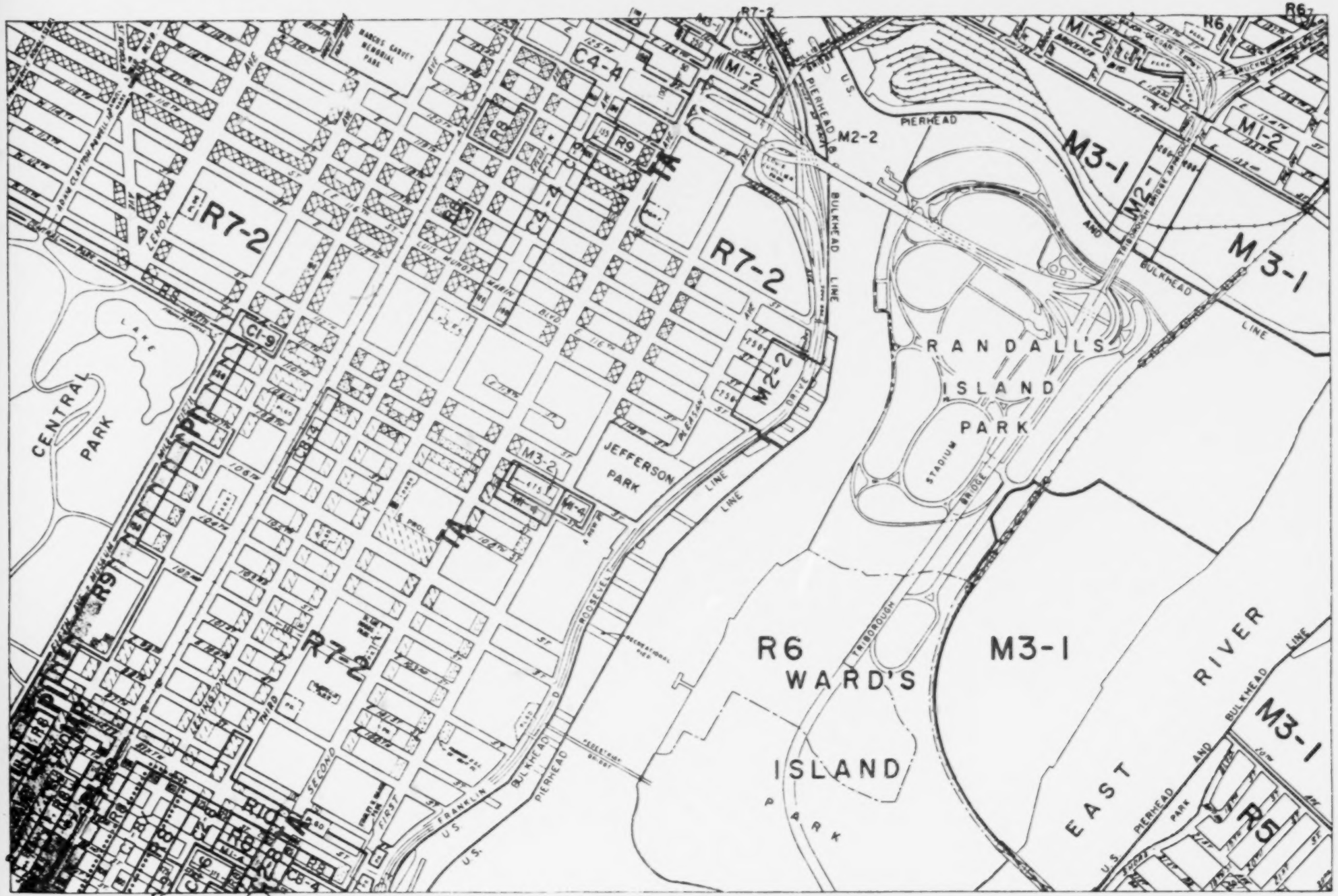
8 *See, e.g., 97 Columbia Heights Housing Corp. v. Board of Estimate*, 67 N.Y.2d 725, 727 (1986); *Victory Boulevard Associates v. City of New York*, 58 N.Y.2d 900, 901 (1983); *High Point Enterprises, Inc. v. Board of Estimate*, 67 A.D.2d 914 (2d Dep't), *aff'd*, 47 N.Y.2d 935 (1979); *Armil Realty Corp. v. Board of Estimate*, 66 A.D.2d 888, 889 (2d Dep't 1978), *aff'd*, 48 N.Y.2d 741 (1979); *Ammirati v. Board of Estimate*, 72 A.D.2d 812 (2d Dep't 1979); *Peter Pan Games of Bayside, Ltd. v. Board of Estimate*, 67 A.D.2d 925 (2d Dep't 1979).

9 Contrary to the City's suggestion (Mtn. p. 55), appellant has proceeded diligently in seeking a variance; the City is responsible for the delay. The court of first instance rendered its decision in November of 1986. Appellant immediately commenced the simultaneous pursuit of both appellate review in the courts and a zoning variance. In December of 1986, as a necessary prerequisite to seeking a variance, appellant resubmitted its building plans to the Department of Buildings and requested a complete reexamination, so that its variance application would be based upon a definitive statement of zoning objections. The Department of Buildings did not conclude that reexamination until May of 1987, at which time appellant immediately filed its application with the BSA, which could not schedule a hearing until the summer of 1988 because it took that long for other city agencies to review appellant's draft environmental impact statement.

Appendix 1

Zoning map 6b, as in public circulation from mid-1984 until December of 1985



ZONING MAP

THE NEW YORK CITY PLANNING COMMISSION

MAJOR ZONING CLASSIFICATIONS

N

R — RESIDENTIAL DISTRICT

C — COMMERCIAL DISTRICT

M — MANUFACTURING DISTRICT

The number(s) and/or letter(s) which follows an "R", "C", or "M" district designation indicates use, bulk, and other controls as described in the text of the Zoning Resolution.

SPECIAL PURPOSE DISTRICTS

The letter(s) within the shaded area designates the special purpose district as described in the text of the Zoning Resolution.

INDICATES PROPERTY REZONED BY AMENDMENT EFFECTIVE : 5-24-84
A-1398

(D) RESTRICTIVE DECLARATION, FOR DETAIL REFER TO R.D. SHEET.

MAP KEY

5c	6a	6c
5d	**6b**	6d
8c	9a	9c

ZONING MAP 6b

C1-1 C1-2 C1-3 C1-4 C1-5 C2-1 C2-2 C2-3 C2-4 C2-5

● COPYRIGHTED BY THE CITY OF NEW YORK

Appendix 2

Diagram dated October 25, 1982, certified by City Planning Commission and incorporated in Board of Estimate's resolution of March 3, 1983

C 830111 ZMM

D-22

CENTRAL PARK

METROPOLITAN MUSEUM OF ART

CITY PLANNING COMMISSION
CITY OF NEW YORK

DIAGRAM SHOWING PROPOSED ZONING CHANGE ON SECTIONAL MAPS 5d, 6b, 8c & 9a

BOROUGH OF MANHATTAN

Certification Date
New York, October 25, 1982

Director of Technical Review

Chief Engineer

SCALE IN FEET
600 300 0 600

NOTE:

——— indicates Zoning District boundary.

..... The area enclosed by the fine dotted line is proposed to be changed from C1-9, R10 and PI Districts to C1-7, C1-8A, R9A, R8, R7-2 and LH-1A Districts.

C5-1 indicates a C1-5 District.

LH-1A indicates a Limited Height District.

MP indicates a Special Madison Avenue Preservation District.

PI indicates a Special Park Improvement District.

Y indicates a Special Yorkville East 86th Street District.

MID indicates a Special Midtown Development District.

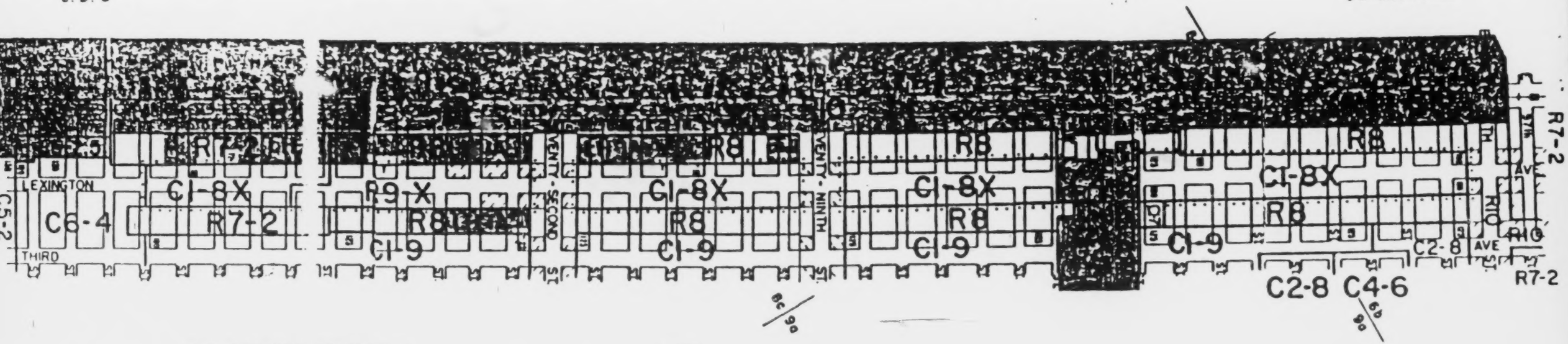
(D) indicates a Restrictive Declaration Area.

Appendix 3

Diagram dated December 5, 1983, certified by City Planning Commission and incorporated in Board of Estimate's resolution of May 24, 1984

C. D. 8

C 840364 ZMM



CITY PLANNING COMMISSION
CITY OF N · YORK
DIAGRAM SHOWI VG PROPOSED
ZONING :HANGE
ON SECTIO IAL MAPS
6b, 8c & 9a
BOROUC H OF
MANHA TAN

Certification Date
New York, December 5, 1983

Sotirios Vogges
Director of Technical Review

Julius Spiegel P.E.
Chief Engineer

SCALE IN FEET
600 300 0 600

NOTE:

——— Indicates Zoning District Boundary.

..... The area enclosed by the fine dotted line is proposed to be changed from C1-8A and R9A Districts to C1-8X and R9X Districts.

Indicates a C1-5 District.
Indicates a Limited Height District.
Indicates a Special Park Improvement District.
Indicates a Special Yorkville East 86th. Street District.
Indicates a Special Midtown Development District.